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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the Matter of:

) No. R-11-0016

)

) **COMMENT OF ARIZONA**

Petition to Amend Rule 32.2(a) & (b),
Arizona Rules of Criminal Procedure

) **ATTORNEYS FOR CRIMINAL**

) **JUSTICE REGARDING PETITION**

) **TO AMEND RULE 32.2(a) & (b),**

) **ARIZONA RULES OF CRIMINAL**

) **PROCEDURE**

)

)

¶1 Pursuant to Rule 28 of the Arizona Rules of Supreme Court, Arizona Attorneys for Criminal Justice (“AACJ”) hereby submits the following comment to the above-referenced petition. AACJ is a not-for-profit membership organization representing four hundred criminal defense lawyers licensed to practice in the State of Arizona, as well as law students and other associated professionals, who are dedicated to protecting the rights of the accused in the courts and in the legislature.

¶2 AACJ supports amendment of this rule, although AACJ submits that the proposed change offered by petitioners is too restrictive and may render other petitioners, particularly those who are less sophisticated and have no access to counsel, unable to fully exercise their rights under the law. AACJ instead asks this Court to adopt the change proposed in the comment of the State Bar of Arizona, which is simple and avoids unnecessary risk of restricting rights of future petitioners. AACJ restates the State Bar of Arizona’s proposal here:

CURRENT VERSION: “b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(d), (e), (f), (g) and (h).”

MODIFIED VERSION: “b. Exceptions. Rule 32.2(a) shall not apply to claims for relief based on Rules 32.1(b) involving subject matter jurisdiction, (d), (e), (f), (g) and (h).”

¶3 A judgment or order is void, and not merely voidable, if the court that entered the order lacked jurisdiction: 1) over the subject matter, or 2) over the person involved, or 3) to render the particular judgment or order entered. *State v. Cramer*, 192 Ariz. 150, 153 ¶ 16, 962 P.2d 224, 227 (App. 1998). “The issue of jurisdiction may be raised at any time.” *State v. Flores*, 218 Ariz. 407, 409-10 ¶ 6, 188 P.3d 706, 708-09 (App. 2008); Rule 16.1(b) Ariz. R. Crim. P. Subject matter jurisdiction can never be forfeited or waived, and defects in subject matter jurisdiction must be corrected, even if the error was not raised in a lower court. *State v. Chacon*, 221 Ariz. 523, 526 ¶ 5, 212 P.3d 861, 864 (App. 2009) (citing

United States v. Cotton, 535 U.S. 625, 630 (2002)). Because subject matter jurisdiction can never be waived, even after conviction requiring a petitioner to provide, in a successive notice of post-conviction relief, the reasons for raising the issue in an untimely manner would be both improper and illegal.

¶4 A recent opinion of the Court of Appeals demonstrates the necessity for this rule change. *State v. Espinoza*, __ Ariz. __, 2012 WL 1511733 (Ariz. Ct. App., April 30, 2012). In that case, Mr. Espinoza was adjudicated delinquent by the juvenile court on one count of attempted molestation of a child. The Juvenile Court never ordered him to register as a sex offender as a condition of this adjudication. After he turned eighteen, Mr. Espinoza was indicted in 2003 in Pima County Superior Court on one count of burglary in the third degree. He eventually pled guilty to one count of criminal damage and was sentenced to probation. As a condition of his probation, however, the Superior Court ordered Mr. Espinoza to register as a sex offender, because the presentence report stated that it appeared Mr. Espinoza never registered as a sex offender, and the court, prosecutor, and defense attorney all presumed that he was required to register without anyone bothering to check on the veracity of the claim.

¶5 The criminal damage case, with its erroneous order to register, then served as the basis to arrest and charge him in Pima County in 2004 for a “failure to register.” A.R.S. § 13-3821. Defense counsel in that case also failed to see the

mistake of fact in the criminal damage case; Espinoza pled guilty and endured a prison sentence. Upon release, the Pima County failure to register case resulted in a Maricopa County failure to register case for which he was also incarcerated after pleading guilty without anyone noticing the problem with the underlying order. Mr. Espinoza spent over four years in prison for offenses he never committed.

¶6 Upon his release from prison on the Maricopa County conviction, Mr. Espinoza again was charged in Pima County for failing to register. This time, his counsel discovered the error and the state voluntarily dismissed the prosecution.

¶7 In 2010, Mr. Espinoza filed a petition for post-conviction relief on his 2003 criminal damage conviction, pursuant to Rule 32. In that petition, Mr. Espinoza argued that he was “actually innocent,” not of criminal damage, but of the requirement that he register as a sex offender. The trial court denied relief, holding that: 1) Mr. Espinoza’s claim was precluded as untimely, and 2) his claim of “actual innocence” of the registration requirement did not fall under any exception to the preclusion requirements of Rule 32. On review, the Court of Appeals upheld the trial court’s ruling, stating that Mr. Espinoza’s claim of “actual innocence” of the registration requirement was precluded as untimely, because Rule 32.1(h) only provides relief when a defendant is actually innocent of the underlying offense, and not when a defendant has been sentenced unlawfully.

¶8 New counsel then sought Rule 32 relief to vacate the Pima County failure to register case, which seemed to be the epicenter of the unlawful convictions. Espinoza sought relief on the ground that he was actually innocent (Rule 32.1(h)), as claims under Rules 32.1 (a), (b), and (c) were precluded. He argued, *inter alia*, that the trial court in the criminal damage case never had the authority to order registration; consequently, he was legally and factually innocent, and his conviction in the Pima County failure to register case should be vacated. While this issue was described in terms of authority, power, and jurisdiction, it was ultimately determined that the order to register in the criminal damage case was merely voidable and not void, and all appellate courts denied relief. Espinoza then sought Rule 32 relief in the criminal damage case raising similar arguments, but that case was in a far weaker procedural position due to its age. Unsurprisingly, courts at all levels denied Espinoza relief.

¶9 Upon being charged yet again in Pima County in 2011 with failing to register, the prosecution this time insisted on proceeding with the case. The trial court not only dismissed the prosecution, however, but also found that the original order to register was void, and therefore all successive prosecutions of Mr. Espinoza were also void. The trial court further ordered that Mr. Espinoza shall no longer be required to register. *Espinoza*, ¶¶ 11-12. The State appealed the ruling and the Court of Appeals published its opinion that the trial court acted properly.

The Court of Appeals held that the Superior Court in 2003 lacked the subject matter jurisdiction to order Mr. Espinoza to register as a sex offender because it was using the juvenile adjudication as a basis for making the order, and as a consequence, the order requiring him to register was void. *Id.* ¶ 31. The court also held that Espinoza’s convictions in 2004 and 2008 for failing to register as a sex offender were founded entirely on his violation of the void registration order in 2003, and that “therefore, those convictions are likewise invalid and ineffective for any purpose.” *Id.* ¶ 32. Finally, the court concluded that “[t]he trial court in the instant case did not err in finding the original order void or in concluding Espinoza not only has no duty to register as a sex offender in the future, but never has had such a duty.” *Id.* ¶ 33.

¶10 Rule 32 is a vital tool for redressing wrongful convictions, and the proposed rule change will insure that petitioners like Mr. Espinoza receive justice when it is undeniable that justice is deserved. Because Rule 32 purports to be an exhaustive list of all potential claims on post-conviction relief and has strict rules governing preclusion, many successive petitions are barred by preclusion regardless of their merit. Furthermore, trial courts routinely misapply preclusion by finding claims of ineffective assistance of counsel barred because appellate counsel did not raise the underlying claim (even when the ineffective assistance claim is also brought against appellate counsel). Division Two of the Court of Appeals, as a

matter of practice, grants review of every petition for review and regularly notices these errors, but Division One grants review rarely. This means that, in practice, the trial court is often the first *and* last court to review a petition for post-conviction relief. By exempting from preclusion claims that a court acted without subject matter jurisdiction, the rule would be made consistent with the law, and confusion such as that apparent in Mr. Espinoza's case will be significantly reduced.

¶11 For these reasons, AACJ respectfully requests this Court grant the petition to amend Rule 32.2(b) so that a claim for post-conviction relief brought under Rule 32.1(b) is not subject to preclusion.

DATED: May 18, 2012.

ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE

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This comment e-filed this date with:

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